THE LEGAL PROFESSION UNDER SCRUTINY

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Recent courtroom events have subjected the American legal profession to great public scrutiny and discussion. Many of our citizens are critical of the law and the legal profession. They are making those of us in the legal profession question many of our basic legal precepts.

The dual and apparently inconsistent verdicts reached in the Rodney King, the Crown Heights, and, yes, the O.J. Simpson cases emphasize the dilemma faced by the legal profession. How does the profession reconcile and accommodate these inconsistent jury verdicts? More important, what do those verdicts say about the role of the lawyers involved in those cases?

In my daily administration of our justice system, I have found many disquieting circumstances. In large measure, litigation has become an intricate game rather than a search for truth. I believe for this reason the legal profession may no longer be seen as the honorable, revered profession that so many of us found when we first entered the profession.

Much of the problem here may rest with our current conception of what is perceived to be the correct role of the "advocate." I have found defense lawyers willing to go to virtually any length to vindicate their client's cause. All too often, they attempt to obfuscate rather than to elucidate as they present their cases to a jury. Rarely is there a search for the truth. Instead, in criminal cases the defense lawyer is obsessed with creating doubt even where it is clear little doubt exists. As a result, juries not conversant with legal standards upon which they are obligated to base their decisions become confused and make decisions that are clearly contrary to the evidence presented to them. In one case before me, the jury became so confused by arguments advanced by the defense attorney concerning reasonable doubt that the majority of the jury believed that a single fingerprint on a gun was insufficient to establish the defendant's guilt in the absence of four more matching prints. The complaint was what happened to the other four prints. Overwhelming evidence is often refuted on the basis of emphatic assertions by an attorney that a reasonable doubt exists as to the guilt of the defendant. The question often asked is "Where are the tapes?"

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Unfortunately, members of the legal community who are concerned with such matters are marginalized by many in the profession by being criticized as being outside the mainstream of legal thinking. Just look at the criticism Judge Rothwax has received with regard to the "take no prisoners" views he expressed in his thoughtful book, *Guilty*. In his book Judge Rothwax talks about the increasingly "arcane technical and complex nature of our law." He says "the mass of rules grows like a fungus developing a life of its own. Ultimately, it turns in on itself and consumes its own flesh—making a mockery of the very rights it is designed to protect."

Attorneys representing the government are not above criticism although perhaps not to the same extent as their defense attorney counterparts. For one thing, I do not believe prosecutors in all instances give the careful scrutiny they should to the activities of police officers in executing search warrants and in their apprehension of defendants. At suppression hearings, the presentation often seems scripted. Indeed, in some cases, juries have turned defendants free because they were upset with police tactics.

Because of changes in the law dictated by our legislators, the government's role has been de facto transformed so that prosecutors have taken on some of the powers of judges. The government is now permitted to provide, at its discretion, "letters of co-operation" before sentencing. These letters grant authority to depart from mandatory minimum sentences and the sentencing guidelines which would otherwise fix the sentence to be imposed. The ability to lessen a defendant's sentence through the issuance of a letter of co-operation places that individual in an often precarious position. To obtain such a letter, a defendant regularly is forced to re-enter a dangerous environment at great personal risk to gather evidence of new crimes the government often requires of them. They have in effect become "slaves" to their police handlers doing their bidding with no questions asked. Moreover, those defendants who have the most to offer are usually the very criminals who are the most involved in criminal activities. Through this so-called cooperation, they end up often getting little or no prison time, while the minor players who can provide the government with little or no assistance serve long sentences. Please remember it is the government that has virtually the complete discretion to determine at what point an individual has earned a letter of co-operation. I have had several cases where drug dealers have enticed young ladies to carry drugs for them. When caught, the drug dealer pleads guilty, cooperates and gets a sentence less than called for by mandatory minimum sentences or the sentencing guidelines. The female accomplice, unable to provide "substantial" assistance, often gets the legislatively mandated higher sentence.

There have been occasions where the government has applied the Brady Doctrine narrowly and has not turned over so-called exculpatory evidence prior to the court's intercession in the proceeding. The government's newly adopted crime fighting strategies of searching defense lawyers' offices and carrying out a program of "order maintenance" raise a new set of ethical concerns.

How often do we have defense lawyers with little basis in fact accusing government counsel and law enforcement officers of conspiring to frame their

client? Similarly, in recent days we have received disturbing information about alleged problems in the FBI Crime Lab. When did the government know of those problems and what did it do about them? If we expect juries to come to fair verdicts, supported by the evidence, and not believe "crazy" conspiracy theories concocted by defense lawyers, it is imperative that the government not provide a basis for making such accusations.

In the business law context, a new ethical dilemma has arisen. Recently, Congress has enacted a law that will now allow publicly traded companies to put out information that may well be false and misleading, as long as such information is tempered with cautionary language designed to alert the investing public of that possibility.

There are now what have been euphemistically dubbed "safe harbors." They shield publicly-held companies and those individuals acting on their behalf from liability when they file periodic reports and proxy statements containing false and misleading "forward-looking" statements if such statements are accompanied by qualified "cautionary" language. Look at the corporate lawyers' dilemma in counseling clients that conduct which is unethical and should be discouraged, is in fact "legal" and therefore permissible.

Attorneys involved in civil litigation are at times making use of the Federal Rules of Civil Procedure to circumvent discovery. For example, attorneys have invoked the rules to shield their clients from the production of documents they know to be detrimental to their client's interests. A recent high profile case has highlighted ethical issues surrounding the timing and advisability of the destruction of corporate documents in the so-called routine course of business. The ethical issue posed: is it appropriate for a corporation to destroy documents, when it is foreseeable that they may at some future date have probative value to individuals with inchoate claims against the corporation?

In order not to disappoint those of you who might have read my opinion in the Lincoln Savings & Loan case, I will once again ask the question "where were the professionals" when the savings and loan scandal occurred resulting in the loss of billions of dollars of the public's money? The lawyers and accountants could have blown the whistle at an early stage of that debacle. To the contrary, the professionals helped fuel it. They applied expansively the rules of their respective professions to aid and abet their clients in pursuing their highly questionable courses of conduct.

What are the solutions to these problems? Here, I believe the academy, because of its great talent base and perceived objectivity, has an important role. One of the truly heartening developments of recent vintage is the migration to law school teaching positions by some of our finest legal minds. The trend of the recent past where a good part of our top legal talent was drawn into the profession by the dollar has been significantly reversed. Just observe how difficult it is to obtain a tenured teaching position at any our fine law schools. This is reminiscent of former days when you spoke in reverence of the Wigmores, Willistons, and Corbins, etc.

Here is a partial prescription for reform.

The duties and responsibilities of the legal profession must be clearly defined. It would be a mistake to stop simply at making a few cosmetic changes to the various ethical codes. Instead, I believe we must determine what it is the legal profession is expected to contribute to benefit society.

There is a delicate balance between seeking the truth and zealously representing the interests of a client. A good case can be made that the balance has been substantially shifted in favor of the individual client to the detriment of societal interests. Perhaps it is time to recalibrate the scales.

Another avenue that would be profitable to explore is trying to make the criminal model more like its civil counterpart. The excesses that arise in litigation seem to be fewer by far in civil cases. What is more, the civil model seems to have the requisite machinery to deal with such excesses. Where justice requires, judges have the ability to grant new trials, direct verdicts for either party, reduce jury awards, to list only a few of the valuable tools available to right "civil wrongs."

It is important that the legal profession recognize it is at a crossroads and that action is required. The present legal model is in need of repair and the fine law schools of this nation have an important role to play in prescribing the necessary corrective measures. They must not shirk from this role.